SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 626.

WILLIAM HEPNER

vs.

THE UNITED STATES.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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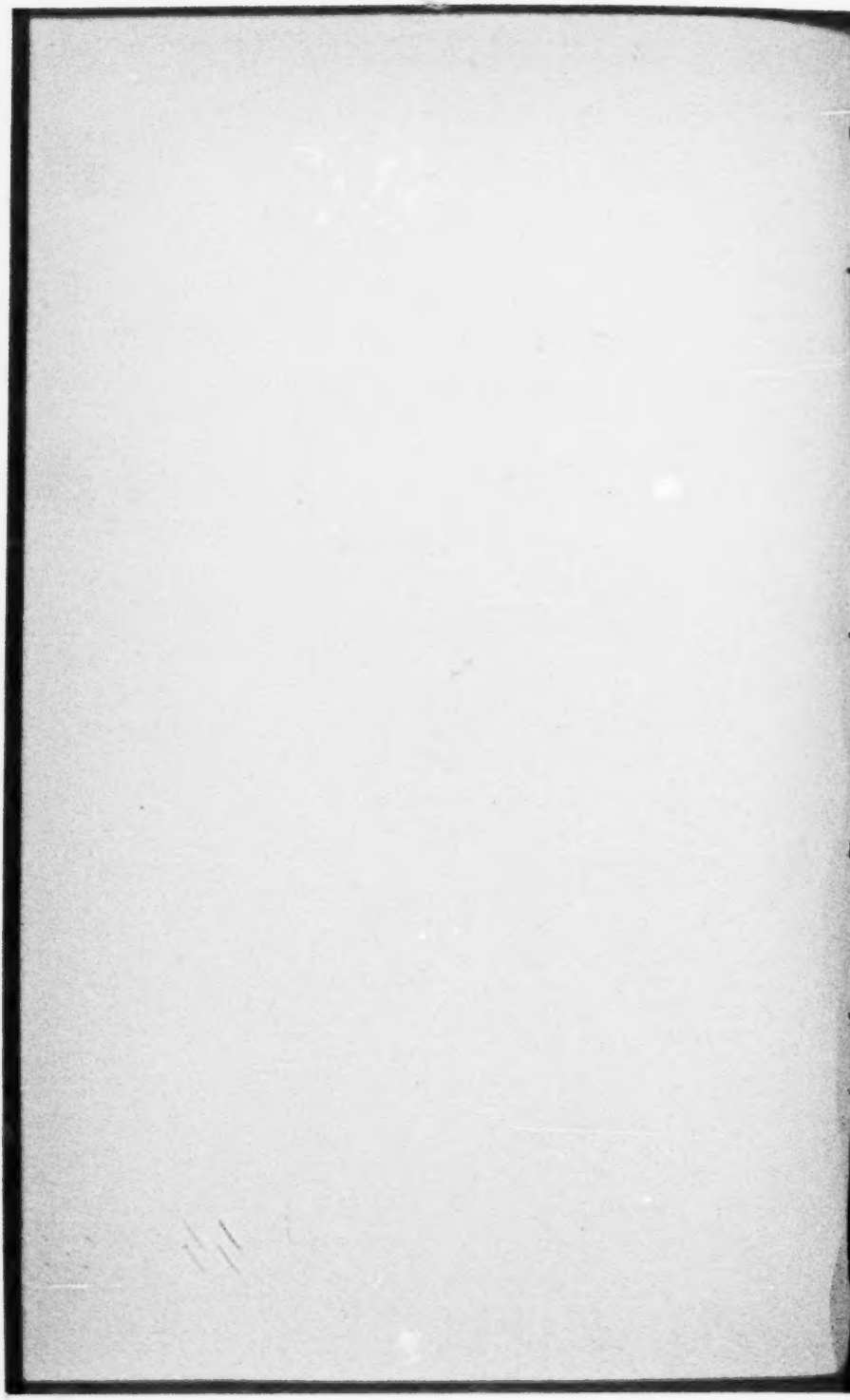

1 United States Circuit Court of Appeals, Second Circuit.

Before Lacombe, Ward, and Noyes, circuit judges.

WILLIAM HEPNER, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES, DEFENDANT IN ERROR.

This cause came here upon writ of error to review a judgment of the Circuit Court, Southern District of New York, in favor of defendant in error, which was plaintiff below. After hearing and rehearing, this court agreed as to all the questions except one only, upon which it desires the instruction of the Supreme Court for its proper decision.

STATEMENT OF FACTS.

The action was brought to recover the sum of one thousand dollars for a violation of the provisions of secs. 4 and 5 of the act of March 3, 1903, forbidding the knowingly assisting, encouraging, or soliciting the migration or importation of any alien to the United States to perform labor or service of any kind by reason of any offer, solicitation, promise, or agreement, expressed or implied, parole or special.

The testimony showed that an alien was induced to migrate to this country to perform labor by reason of an "offer, solicitation, or promise" of the defendant. There was no conflict of tectimony.

2 QUESTION CERTIFIED.

Upon the facts above set forth the question concerning which this court desires the instruction of the Supreme Court is:

"When it appears by undisputed testimony that a defendant has committed an offense against secs. 4 and 5 of the act of March 3, 1903, may the trial judge direct a verdict in favor of the Government, plaintiff, which has sued for the $1,000 forfeited by such offense under said section 5?"

In accordance with the provisions of section 6 of the act of March 31, 1891, the foregoing question of law is, by the Circuit Court of Appeals for the Second Circuit, hereby certified to the Supreme Court.

New York, June 29, 1908.

E. HENRY LACOMBE,
H. G. WARD,
WALTER C. NOYES,
Circuit Judges.

3 UNITED STATES OF AMERICA,
Southern District of New York.

I, William Parkin, clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing certificate was filed and entered of record in my office on the 29th day of June, 1908, and by direction of the judges of said court the same is forwarded by me to the Supreme Court of the United States.

Dated New York, June 29, 1908.

[SEAL.] WM. PARKIN,
Clerk of the United States Circuit Court of Appeals for the Second Circuit.

4 (Indorsed:) United States Circuit Court of Appeals, Second Circuit. William Hepner, plff. in error, vs. the United States, deft. in error. Certificate to Supreme Court. Office of the clerk Supreme Court U. S. Received Jun. 30, 1908. United States Circuit Court of Appeals, Second Circuit. Filed Jun. 29, 1908. William Parkin, clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1908.

WILLIAM HEPNER
v.
THE UNITED STATES. } No. 626

BRIEF FOR WILLIAM HEPNER.

The only question to be decided in this case is whether Congress can inflict punishment by providing a money forfeiture and allowing it to be sued for, and so avoid the effect of the Constitutional amendment guaranteeing a trial by jury.

It is granted that if the same penalty were to be inflicted as a result of criminal procedure, the defendant could not be punished by the Court without the verdict of a jury.

I must say with due respect to the Attorney General's office, that its contention here seems to be that the Constitution ought to be avoided, if possible, in order to facilitate business. The refinement and distinction presented seems to involve the suggestion that in considering the constitutional guarantees, we should at times resort to ingenuity and subtlety. I would rather, as a mere citizen, labor under my present conviction that the Depart-

ments of the Government will apply the Constitution as it reads, to the average citizen.

If there should develop a difficulty in getting verdicts from juries in cases on the criminal side of the court, then, under the proposition of the Government, Congress could provide punishment for all offences by penalties and forfeitures, instead of by fines and imprisonments.

It is rather difficult to mark the limits to which forfeitures might be raised. It is perhaps enough to say that to take One Thousand Dollars from the average American citizen is to reduce him to poverty. Probably ninety per cent. of all business men and farmers would be ruined by the collection of $1,000 in cash from their properties respectively.

It would seem that only one test can be applied to a case of this kind, and that by the question, "Is the forfeiture provided for in the statute intended as punishment?" If punishment is intended, then is not the person accused, whether accused by indictment, or in an action of debt, entitled to a jury trial?

The case of *United States* v. *Zucker*, is easily differentiated from the one before the Court. The proceeding was for the purpose of collecting the value of certain merchandise alleged to have been forfeited to the United States under the provisions of the Customs Administration Act.

The action in that case proceeded upon the assumption that the forfeiture of the goods had oc-

curred, and that the value of the goods belonged to the Government. It seems altogether technically reasonable to say that an action to recover that amount is not criminal in its nature.

Under the Contract Labor Law, it is made a misdemeanor to bring into this country an alien under certain circumstances, and the offence is punishable by the forfeiture of a Thousand Dollars.

It seems, however, unnecessary to argue that this Court was right when in *Lees* vs. *The United States*, speaking of a like action under this statute, it said,

> "This, though an action civil in form, is unquestionably criminal in its nature."

This decision led the Court of Appeals to reverse the judgment in this case of the District Court. The opinion was published in the New York Law Journal, May 23d, 1908.

Subsequently a rehearing was granted in response to the District Attorney's argument, and then the question certified. The argument, somewhat novel as applied to a constitutional proposition, was that of the inconvenience of the intervention of a jury, the consequent delay and the practice of the District Court. These arguments of inconvenience and of precedents established by the minor tribunals (the Attorney-General in his brief also cites such practice in support) are not of the character appropriate to a discussion of a constitutional question. The way of the Constitution should be as plain as that of a turnpike road, and

expense, inconvenience and precedents of lower courts should not lead us into the by-paths where the plain people cannot follow.

We respectfully submit that an affirmative answer to the question submitted by the Court of Appeals would mean and certainly could be so used, as to despoil, in a large measure, the American people of the right of trial by jury.

S. P. McCONNELL,
Counsel for William Hepner.

January, 1909.

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

WILLIAM HEPNER
v.
THE UNITED STATES. } No. 626.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case comes here upon a certification of a question from the Circuit Court of Appeals for the Second Circuit, in accordance with section 6 of the Judiciary Act of March 3, 1891 (26 Stat., 826, 828).

The present action was a civil action, brought under the provisions of the New York Code of Civil Procedure, in the District Court of the United States for the Southern District of New York, to recover the sum of $1,000 for a violation of the provisions of sections 4 and 5 of the Immigration Act of March 3, 1903 (32 Stat., 1213, 1214).

These sections are as follows:

> SEC. 4. That it shall be unlawful for any person, company, partnership, or corpora-

tion, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any alien into the United States, in pursuance of any offer, solicitation, promise, or agreement, parole or special, expressed or implied, made previous to the importation of such alien to perform labor or service of any kind, skilled or unskilled, in the United States.

SEC. 5. That for every violation of any of the provisions of section four of this act the person, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any alien to the United States to perform labor or service of any kind by reason of any offer, solicitation, promise, or agreement, express or implied, parole or special, to or with such alien shall forfeit and pay for every such offense the sum of one thousand dollars, *which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name* and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, *as debts of like amount are now recovered in the courts of the United States;* and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States.

The testimony being undisputed that the defendant induced an alien to migrate to this country in violation of the above sections 4 and 5, the trial court directed a verdict in favor of the plaintiff, the Government. From this judgment a writ of error was sued out from the Circuit Court of Appeals, which, after hearing and rehearing the case, agreed as to all the questions except the following one upon which it desires the instruction of this court for its proper decision.

QUESTION CERTIFIED.

> When it appears by undisputed testimony that a defendant has committed an offense against sections 4 and 5 of the act of March 3, 1903, may the trial judge direct a verdict in favor of the Government, plaintiff, which has sued for the $1,000 forfeited by such offense under said section 5?

ARGUMENT.

I.

An action under section 5 of the contract labor law is an ordinary civil action in debt upon the statute and not a "criminal prosecution;" therefore, when, by undisputed testimony, a violation of the act is shown, in view of the controlling decision in United States v. Zucker (161 U. S., 475) and the authorities generally, the trial judge may direct a verdict in favor of the Government, plaintiff.

The statute under which this case was brought provides that the sum of $1,000 "may be sued for and recovered by the United States, or by any

person who shall first bring his action therefor in his own name * * * as debts of like amount are now recovered in the courts of the United States * * *."

In other words, this is an ordinary *qui tam* action, to be pursued either by the United States or any private person (*Werckmeister Co.* v. *American Tobacco Co.*, 207 U. S., 375), which Congress expressly provided "may be enforced in a civil action, and in the same manner that debts are recovered in the ordinary civil courts." (*Lees* v. *United States*, 150 U. S., 476, 479.)

The principle is firmly established in this court that in all except criminal proceedings, when the testimony is undisputed, the trial court may direct a verdict for the plaintiff.

In *Four Packages* v. *United States* (97 U. S., 404, 412), a suit of forfeiture for violation of customs laws, Mr. Justice Clifford, in delivering the opinion of the court, said:

> Taken as a whole, the evidence fully proved that the packages were unladen and delivered without the permit required by the act of Congress; and inasmuch as there was no opposing testimony, the direction of the court to the jury to return a verdict for the plaintiffs was entirely correct.

The question certified must, therefore, be answered in the affirmative unless some constitutional limitation required that the trial court submit

the case to the jury though the evidence was undisputed. The only constitutional limitations claimed to be applicable are Article III, section 2, and the sixth amendment. Article III, section 2, which provides that "the trial of all crimes, except in cases of impeachment, shall be by jury," does not require separate consideration, for the provisions of the sixth amendment covering the same subject are controlling. (*Schick* v. *United States*, 195 U. S., 65, 68–69.)

The right of the defendant, therefore, to go to the jury arises, if it exists at all, under the sixth amendment, which is as follows:

> In all *criminal prosecutions*, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

But this court has decided that the constitutional protections of this amendment do not apply to a *civil action* such as the present for the collection of a money judgment for a penalty or forfeiture. This was the decision in *United States* v. *Zucker* (161 U. S., 475), where this court

flatly denied that the defendant in a civil action such as the present can invoke the privileges of the sixth amendment, saying (p. 481):

> *The sixth amendment relates to a prosecution of an accused person which is technically criminal in its nature.* In such a proceeding the person accused is entitled to a speedy and public trial by an impartial jury of the State, as well as of a district previously ascertained by law in which the crime charged against him shall have been committed; *whereas an action in which a judgment for money only is sought, even if, in some aspects, it is one of a penal nature,* may be brought wherever the defendant is found and is served with process, unless some statute requires it to be brought in a particular jurisdiction. The words in the sixth amendment, "to be informed of the nature and cause of the accusation," obviously refer to a person accused of crime, whether a felony or misdemeanor, for which he is prosecuted by indictment or presentment, or in some other authorized mode which may involve his personal security.

This decision, we submit, is decisive of the issue at bar and calls for an affirmative answer to the question certified.

In truth, the money forfeiture provided by section 5 of the immigration act of March 3, 1903, is one of that long-established and well-recognized class of penalties which do not rise to the seriousness or dignity of crimes, but which may be and

always have been recovered by procedure civil in form.

In *Atcheson* v. *Everitt* (1 Cowp., 382, 391), which was an action of debt upon a statute for forfeiture of £500, decided in 1776, Lord Mansfield said:

> Now, there is no distinction better known than the distinction between *civil* and *criminal* law; or between *criminal prosecutions* and *civil actions*.
>
> Mr. Justice Blackstone and all modern and ancient writers upon the subject distinguish between them. *Penal* actions were never yet put under the head of criminal law or crimes. The construction of the statute must be extended by equity to make this a *criminal cause*. It is as much a *civil* action as an action for *money had and received*.
>
> *3 Black. Comm.*, 160.
>
> *Viner Abr. tit.* "*Debt*" (K 2), p. 346 (1752).

It is evident, therefore, that the distinction between civil actions for penalties and technical criminal prosecutions was an old distinction of the common law, well known at the time of the adoption of the Constitution. Since the provisions as to "criminal prosecutions" must be read in the light of the common law (*Callan* v. *Wilson*, 127 U. S., 540–549), clearly these constitutional limitations as to prosecutions are inapplicable to civil actions for pecuniary penalties. In other words, the Constitution has not imposed limitations as to the method to be prescribed by Congress for the recovery of such penalties. What was said in

Missouri Pacific Railway Company v. *Humes* (115 U. S., 512, 523) as to the power of the State is equally pertinent when applied to the power of Congress:

> The power of the State to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party, or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion.

The sixth amendment concerns itself solely with matters of procedure in the prosecution of crime. The view of this court that this amendment does not apply to civil actions for penalties is the one that has been almost uniformly upheld by the courts, and it may be stated to be the general rule that, in the absence of statute, the procedure applicable to ordinary civil suits, and not that of criminal prosecutions, is followed in penal actions. This principle appears from a large number of cases raising the question in a variety of ways.

DIRECTION OF VERDICT.

It has been the unquestioned practice to direct a verdict for the plaintiff in actions for penalty.

Four Packages v. *United States*, *supra*, 97 U. S., 404.

People v. *Girard*, 73 Hun., 457, affd., 145 N. Y., 105.

United States v. *Thompson*, 41 Fed. Rep., 28.

Fielding v. *LaGrange*, 104 Iowa, 530.

See also *Moller* v. *United States*, 57 Fed. Rep., 490, 495, which was an action like the one at bar, for penalty under the contract-labor law, and in which a trial by jury was waived.

FORM OF ACTION.

The authorities are unanimous that a penal action for a sum certain may be recovered by the civil remedy of debt. In *Stockwell* v. *United States* (13 Wall., 531, 542), this court, by Mr. Justice Strong, said:

> It would seem, therefore, that whether the liability incurred is to be regarded as a penalty, or as liquidated damages for an injury done to the United States, it is a debt, and as such it must be recoverable in a civil action.

So, also, *Chaffee & Co.* v. *United States* (18 Wall., 516, 538), where the court said:

> The action of debt lies for a statutory penalty because the sum demanded is certain, but though in form *ex contractu*, it is founded in fact upon a tort.
>
> (See *United States* v. *McElroy*, 115 Fed. Rep., 252.)

This court recently held in *Werckmeister Company* v. *American Tobacco Company* (207 U. S., 375) that, though the United States was entitled to

one-half of a penalty, it need not be a party to the proceeding. Nothing could demonstrate more clearly the civil character of these actions.

VENUE.

Penal actions are transitory, while criminal actions must be tried in the district where the offense is committed. (Sec. 732, R. S. U. S.; act of February 28, 1839.)

In *United States* v. *Craig* (28 Fed. Rep., 795, 800–801), which was an action like the present for penalty under the contract-labor law, Mr. Justice Brown said:

> But, again, supposing the offense were wholly upon foreign soil, this action would still lie, under the second clause of section 732, if the defendant be "found" within the district. This is a civil action for a debt, and it is immaterial where the cause of action arose, unless it is made material by statute. In this case the section above cited merely affirms the common-law rule applicable to all actions *ex contractu*—that they may be brought wherever the defendant is found.

QUANTUM OF PROOF.

Undoubtedly the better rule is that suits for penalties, as all other civil actions, require only a preponderance of evidence and not evidence beyond a reasonable doubt. The reason for this

rule was thus stated by Judge Wallace in *Hawlowetz* v. *Kass* (23 Blatchf., 395, 398):

> Upon principle, it is not apparent why the rules of criminal evidence should be imported into the trial of actions of debt for penalties, any more than in any other civil actions in which an issue of criminal conduct, such as arson, forgery, perjury, adultery, etc., may be involved. * * * In the federal courts it has been held, that the rule in civil, and not the one in criminal, cases, as to the *quantum* of proof, applies. * * *
>
> In many actions for penalties the issue does not involve an act of any appreciable degree of moral turpitude on the part of the defendant. Many statutes create penalties for acts of mere neglect, in which the knowledge or intention of the offender is not an ingredient. The public welfare may require a rigorous enforcement of some statutes of this kind, but the transgressor is not a criminal, and it seems absurd, when he is charged in a civil suit with their infraction, to regard him as such and try him by the rules of criminal evidence.

The same ruling was made by the Court of Appeals of New York in *People* v. *Briggs* (114 N. Y., 56, 65), the court saying:

> The rule so stated is the proper one applicable to the measure of evidence in civil actions, and such seems to be the weight of authority. (See cases collected in note to

Sprague v. *Dodge*, 95 Am. Dec., 525.) And there is no apparent reason for making any distinction in that respect in behalf of a defendant in an action for a penalty, in which the people are the party plaintiff. It is no less a civil action because so brought. The purpose of the action is not the punishment of the defendant in the sense legitimately applicable to the term, but such action is brought to recover the penalty as a fixed sum by way of indemnity to the public for the injury suffered by reason of the violation of the statute. The effect of the recovery is merely to charge the defendant with pecuniary liability, while a criminal prosecution is had for the purpose of punishment of the accused. And the consequence of conviction may be more serious to him for the reason, if for no other, that it is deemed an imputation affecting his moral standing in a degree dependent, more or less, upon the nature of the crime.

So also *Proctor* v. *People* (24 Ill. App., 599).

See, *contra*, *United States* v. *Shapleigh* (54 Fed. Rep., 126), where the court regarded a suit for penalty based on a felony a criminal case, and yet inconsistently allowed the Government a right of appeal.

It may be that plaintiff in error will cite the case of *Chaffee & Co.* v. *United States* (18 Wall., 516) for the proposition, for which it is sometimes erroneously cited, that in an action brought by the Government to recover a penalty the burden rests

upon the Government to make out its case beyond a reasonable doubt. The real holding of this case was thus explained by Judge Wallace:

> The syllabus in the report of that case is to this effect, but an examination of the opinion shows that no such point was considered by the court. The only point decided was, that the instructions in the court below were erroneous, because they were, in substance, "that the Government need only prove that the defendants were presumptively guilty, and the duty thereupon devolved upon them to establish their innocence, and if they did not they were guilty beyond a reasonable doubt." Commenting upon the instructions given, Mr. Justice Field said: "The instruction sets at naught established principles, and justifies the criticism of counsel that it substantially withdrew from the defendants their constitutional right of trial by jury, and converted what at law was intended for their protection—the right to refuse to testify—into the machinery for their sure destruction." *Hawlowetz* v. *Kass*, 23 Blatchf., 395, 397–398.

In this connection it is only necessary to add that any alleged rule requiring proof beyond reasonable doubt in cases of penalty and forfeiture is opposed to the uninterrupted practice since the establishment of the Constitution. For by act of March 2, 1799 (1 Stat. L., 678), which now constitutes section 909, Revised Statutes United States, the burden of proof in penalty and forfeiture cases

rests upon the claimant of property where probable cause is shown to the satisfaction of the court.

(*Locke* v. *United States*, 7 Cranch, 339; *Taylor* v. *United States*, 3 How., 197; *Cliquot's Champagne*, 3 Wall., 114; *The Coquitlam*, 57 Fed., 706.)

ARREST AND BAIL.

It is well settled that the process of arrest will not issue in penal actions where it does not issue in other civil actions, nor are the provisions as to bail in criminal cases applicable to penal actions.

In *United States* v. *Mundell* (1 Hughes, 415, 423) the court, by Mr. Justice Iredell, said:

> It is scarcely necessary to stop here to observe that the proceeding in question was not a proceeding in a criminal case, within the meaning of the provisions of Congress, but was, in truth, a civil suit, though for an act of disobedience for which a criminal prosecution might possibly have been commenced, if the act of Congress does not expressly, or impliedly, exclude it, a point not material to consider, because the civil suit has, in this instance, been in fact adopted. A criminal proceeding, unquestionably, can only be by indictment or information. The proceeding in question was neither.

In *United States* v. *Younger* (92 Fed. Rep., 672) a bench warrant was refused on information for collection of statutory penalty on the ground that law of State abolished imprisonment for debt.

JURISDICTION AND PRACTICE OF STATE COURTS.

In *Stearns* v. *United States* (2 Paine, 300, 311) it was held by Mr. Justice Thompson that while no jurisdiction over federal criminal offenses might be granted to state courts, still such jurisdiction can be granted over fines and penalties as over other civil actions.

> This was not a criminal prosecution, but a civil action to recover a penalty for breach of a statute. * * * To sustain this suit, is not administering the criminal law of the United States. Actions for penalties are civil actions, both in form and in substance, according to Blackstone (3 Com., 158). The action is founded upon that implied contract which every person enters into with the State to observe its laws.

And in *United States* v. *Banister* (70 Fed. Rep., 44) it was held that state practice applies to a civil action for penalty.

RIGHT OF APPEAL.

In *United States* v. *Baltimore and Ohio Company* (159 Fed. Rep., 33) the Circuit Court of Appeals for the Sixth Circuit held that a civil action for a penalty is not within the rule of *United States* v. *Sanges* (144 U. S., 310), and hence the Government is entitled to have the judgment against it reviewed.

> See *United States* v. *Shapleigh*, 54 Fed. Rep., 126.

JEOFAILS.

In *Jacobs* v. *United States* (1 Brock., 520) Chief Justice Marshall held that the jeofails statute, applicable to civil actions, applies to an action of debt for a statutory penalty.

II.

Decisions holding that an action for a penalty or forfeiture is a "criminal case" within the meaning of the fifth amendment of the Constitution, granting immunity against compulsory disclosure of testimony, are not applicable to the question at bar.

The Circuit Court of Appeals was probably led to certify the present question to this court by the opinion in *Lees* v. *United States* (150 U. S., 476). That was an action under the statute now under consideration, involving the recovery of a similar penalty; and this court held, following the *Boyd case* (116 U. S., 616), that the proceeding against Lees, though civil in form, was "unquestionably criminal in its nature and in such a case a defendant can not be compelled to be a witness against himself."

The Lees and Boyd cases arose under the clause of the fifth amendment, which provides that no person "shall be compelled in any criminal case to be a witness against himself." In holding that the fifth amendment protects persons against self-crimination in any proceeding for forfeiture or penalty, whether in form civil or criminal, and whether in *personam* or *rem* and not merely in cases of technical prosecutions, this court merely construed the amendment in the light of the com-

mon law, which protects self-disclosure in every case involving any penal consequences. (Story, 1 Eq. Pl., sec. 575; Wigmore on Evidence, sec. 2257.) In this connection it may be noted that section 860, Revised Statutes, dealing with the privilege against self-crimination, expressly distinguishes between "criminal proceeding" and the "enforcement of any penalty or forfeiture."

In *United States* v. *Zucker*, supra, this court expressly held, referring to the above-quoted language of the Lees case, that the principle involved in the latter case does not apply to the procedural rights in *criminal prosecutions* secured by the sixth amendment. The fifth amendment applies to every kind of case; it deals with a *cause of qction*, to wit, a "*criminal case.*" The sixth amendment concerns itself solely with a kind of *remedy*, to wit, technical "*criminal prosecutions.*" This distinction this court pointed out in *Counselman* v. *Hitchcock* (142 U. S., 547, 563), where, through Mr. Justice Blatchford, it said:

> A criminal prosecution under article 6 of the amendments, is much narrower than a "criminal case" under article 5 of the amendments.

It is respectfully submitted that the question herein certified by the Circuit Court of Appeals for the Second Circuit should be answered in the affirmative.

WADE H. ELLIS,
Assistant to the Attorney-General.

JANUARY, 1909.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

WILLIAM HEPNER
v.
THE UNITED STATES. } No. 626.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

STATEMENT.

This case comes here upon a certification of a question from the Circuit Court of Appeals for the Second Circuit, in accordance with section 6 of the judiciary act of March 3, 1891 (26 Stat., 826, 828).

The present suit was a civil action, brought in the District Court of the United States for the Southern District of New York, to recover the sum of $1,000 for a violation of the provisions of sections 4 and 5 of the immigration act of March 3, 1903 (32 Stat., 1213, 1214).

These sections are as follows:

> SEC. 4. That it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay

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the transportation or in any way to assist or encourage the importation or migration of any alien into the United States, in pursuance of any offer, solicitation, promise, or agreement, parole or special, expressed or implied, made previous to the importation of such alien to perform labor or service of any kind, skilled or unskilled, in the United States.

SEC. 5. That for every violation of any of the provisions of section four of this act the person, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any alien to the United States to perform labor or service of any kind by reason of any offer, solicitation, promise, or agreement, express or implied, parole or special, to or with such alien shall forfeit and pay for every such offense the sum of one thousand dollars, *which may be sued for and recovered by the United States*, or by any person who shall first bring his action therefor in his own name and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, *as debts of like amount are now recovered in the courts of the United States;* and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States.

The testimony being undisputed that the defendant induced an alien to migrate to this country in violation of the above sections 4 and 5, the trial court directed a verdict in favor of the plaintiff, the Government. From this judgment a writ of error was sued out from the Circuit Court of Appeals, which, after hearing and rehearing the case, agreed as to all the questions except the following one, upon which it desires the instruction of this court for its proper decision:

QUESTION CERTIFIED.

> When it appears by undisputed testimony that a defendant has committed an offense against sections 4 and 5 of the act of March 3, 1903, may the trial judge direct a verdict in favor of the Government, plaintiff, which has sued for the $1,000 forfeited by such offense under said section 5?

CONSTITUTIONAL PROVISIONS INVOLVED.

The provisions of the Constitution which will be referred to in this brief are the following:

Article III, sec. 2, clause 3:

> The trial of all crimes, except in cases of impeachment, shall be by jury.

Amendment V:

> No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or

naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment VII:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law.

ARGUMENT.

I.

This action to recover a penalty is a civil suit; therefore on the undisputed testimony the trial judge was correct in directing a verdict for the plaintiff.

That an action to recover a penalty is a civil suit, in the course of which the rules of procedure followed in civil actions generally apply, has been established by a long line of authorities.

United States v. *Zucker*, 161 U. S., 475.
Four Packages v. *United States*, 97 U. S., 404.
Lees v. *United States*, 150 U. S., 476.
Stockwell v. *United States*, 13 Wall., 531.
Atcheson v. *Everitt*, 1 Cowper, 382.
Mitchell v. *State*, 12 Nebr., 538.
People v. *Briggs*, 114 N. Y., 56.
Roberge v. *Burnham*, 124 Mass., 277.
Hitchcock v. *Munger*, 15 N. H., 97.
Webster v. *People*, 14 Ill., 365.
Hawlowetz v. *Kass*, 23 Blatch., 395.
United States v. *Mundell*, 1 Hughes, 415.
United States v. *Baltimore & Ohio S. W. R. Co.*, 159 Fed., 33.
Stearns v. *United States*, 2 Paine, 300.

In the statute under consideration, Congress unequivocally declared its intention that the remedy should be civil, for the statute prescribes that the one thousand dollars "may be sued for and recovered by the United States or by any person * * * as debts of like amount are now recovered in the courts of the United States." As Congress made no pro-

vision for a proceeding by indictment or information, and did not declare a violation of the statute to be a misdemeanor, the civil remedy created is exclusive, and no criminal proceedings could be based upon a violation of the statute.

The contention of the defendant that a penalty suit is a criminal prosecution, in which the defendant is entitled to go to the jury on the law and the facts, is untenable on principle and unsupported by any authority. In a large number of penalty cases the defendant has claimed a constitutional privilege or right to which he would have been entitled in a criminal prosecution, but this court and the state courts have uniformly denied in penalty cases the existence of the right asserted, holding that a suit to recover a penalty is not a criminal prosecution.

The leading and conclusive case upon the subject is *United States* v. *Zucker* (161 U. S., 475). This court there decided that an action for the collection of a money judgment by way of penalty or forfeiture, for the violation of a statute, was not a criminal prosecution. That was an action brought to recover $346, the value of certain merchandise alleged to have been forfeited for violation of the customs laws. The defendant contended that the case was a criminal prosecution and that the Government could not introduce in evidence a deposition taken in Paris, as the sixth amendment requires that the accused be confronted with the witnesses against him. This court held

that the deposition was rightly admitted, Mr. Justice Harlan saying (p. 481):

> The sixth amendment relates to a prosecution of an accused person which is *technically criminal* in its nature. * * * The words in the sixth amendment, "to be informed of the nature and cause of the accusation," obviously refer to a person accused of crime, whether a felony or misdemeanor, for which he is prosecuted by indictment or presentment, or in some other authorized mode which may involve his personal security. * * *
>
> A witness who proves facts entitling the plaintiff in a proceeding in a court of the United States, even if the plaintiff be the Government, to a judgment for money only, and not to a judgment which directly involves the personal safety of the defendant, is not, within the meaning of the sixth amendment, a witness against an "accused" in a criminal prosecution.

In the Zucker case the defendant claimed a privilege which was expressly granted by the sixth amendment in "criminal prosecutions," to wit, the right to be confronted with the witnesses against him. This court denied his claim, because the action was not a criminal prosecution. In the case at bar the defendant asks even more. He asks that, in a suit for a civil penalty, he shall have not only a right of trial by jury, but that the jury shall pass upon both the law and the facts. We answer that such a suit is not a "criminal prosecution;" that the defendant is not

entitled to a jury at all except it be under the seventh amendment, as to civil actions, and that, in such actions, the court may direct a verdict where the facts are undisputed.

Lord Mansfield, in the old case of *Atcheson* v. *Everitt* (1 Cowper, 382), pointed out the distinction between an action to recover a penalty and a criminal cause. That case, decided in 1776, after having been twice argued before the Court of King's Bench, has become a leading authority upon the question at bar. It was an action of debt to recover a penalty imposed by Statute 2 Geo. II, c. 24, sec. 7, for the offense of bribery. The testimony of a Quaker having been admitted at the trial, the question was, whether it should have been excluded on the ground that the suit was a criminal case under 7 and 8 William III, c. 34. Lord Mansfield said (p. 391):

> Now there is no distinction better known, than the distinction between *civil* and *criminal law;* or between *criminal prosecutions* and *civil actions.*
>
> Mr. Justice Blackstone, and all modern and ancient writers upon the subject distinguish between them. *Penal* actions were never yet put under the head of criminal law, or crimes. The construction of the statute must be extended by equity to make this a *criminal* cause. It is as much a *civil* action, as an action for *money had and received.* The legislature, when they excepted to the evidence of Quakers in *criminal* causes, must be understood to mean causes *technically* criminal.

* * * * *

> No authority whatever has been mentioned on the other side, nor any case cited where it has been held that a *penal* action is a *criminal* case; and perhaps the point was never before doubted.

Even in the absence in the statute of a provision declaring that an action of debt may be brought to recover the penalty imposed, this court has held that such a suit is the proper remedy.

In *Stockwell* v. *United States* (13 Wall., 531) the United States brought an action of debt to recover double the value of certain importations alleged to have been illegally made. The action was brought under 3 Statutes at Large, 781, which provides that "if any person shall receive * * * goods * * * knowing them to have been illegally imported * * * such person * * * shall, *on conviction* thereof, forfeit and pay a sum double the amount of the value of the goods." Regarding the contention of the defendant that debt would not lie, Mr. Justice Strong said (p. 542):

> Nor is it doubted that when a statute gives to a private person a right to recover a penalty for a violation of law he may maintain an action of debt, but it is insisted that when the Government proceeds for a penalty based on an offense against law, it must be by indictment or by information. No authority has been adduced in support of this position, and it is believed that none exists. It can not be that whether an action of debt is maintainable

> or not depends upon the question who is the plaintiff. Debt lies whenever a sum certain is due to the plaintiff, or a sum which can readily be reduced to a certainty—a sum requiring no future valuation to settle its amount. * * * It would seem, therefore, that whether the liability incurred is to be regarded as a penalty, or as liquidated damages for an injury done to the United States, it is a debt, and as such it must be recoverable in a civil action.

The decisions of the state courts are unanimous to the effect that a penal action is civil in character with its procedure governed by the rules applicable to civil suits. The fact that the penalty imposed for violation of the statute has the character of a punishment does not make the suit to recover the penalty a criminal prosecution.

In *Mitchell* v. *The State* (12 Neb., 538, 540) the court said:

> The true test is to inquire whether the proceeding is by indictment or action. If by indictment, the cause is criminal; if by action, the cause is civil. Tested by these rules it will be seen at once that this is a civil action. The object is to recover a money judgment, and the fact that the law designates a specific amount does not change the character of the action.

People v. *Briggs et al.* (47 Hun, 266, affirmed 114 N. Y., 56), was an action for a penalty of $500 imposed by a statute of New York (Laws 1885, c.

183, sec. 7), which prohibited the sale of a product in imitation of dairy butter. The trial court charged the jury that, as the action was a civil action, it was not necessary for the people of New York to establish the case beyond a reasonable doubt. This charge was upheld in well-considered opinions in the Appellate Division and the Court of Appeals. In 47 Hun, 268, the court reviews at length the authorities on the proposition. Judge Bradley of the New York Court of Appeals, after approving the rule stated by the trial judge, says (114 N. Y., 65):

> The purpose of the action is not the punishment of the defendant in the sense legitimately applicable to the term, but such action is brought to recover the penalty as a fixed sum by way of indemnity to the public for the injury suffered by reason of the violation of the statute. The effect of the recovery is merely to charge the defendant with pecuniary liability, while a criminal prosecution is had for the purpose of punishment of the accused.

Roberge v. *Burnham* (124 Mass., 277) was an action of tort to recover $100 under a statute which provided that a person who sold liquor to a minor "shall forfeit $100 for each offense, to be recovered by the parent * * * in an action of tort." The court held that the plaintiff need not prove his case beyond a reasonable doubt, saying (p. 279):

> It is true that this action, like all penal actions, partakes somewhat of the character of punishment, but this does not make it a criminal prosecution.

Hitchcock v. *Munger* (15 N. H., 97) was an action of debt *qui tam* to recover a penalty given by statute for usury. Here also the court held that the plaintiff need not prove his case beyond a reasonable doubt. The court said (pp. 103, 104):

> It is not like a fine where imprisonment is the consequence of nonpayment. * * *
>
> We think that an action *qui tam*, although a process to recover a penalty for the commission of an offense, is not a criminal prosecution in the ordinary sense of that term, and that a verdict for the plaintiff can not be regarded as a conviction of a crime.

In *Webster* v. *People* (14 Ill., 365, 367) the court held that, in an action to recover a penalty of $100 for peddling without a license, it is not necessary to prove the charge beyond a reasonable doubt. The statute provided that any person violating it shall forfeit and pay the sum of $100 to be recovered by action of debt. The court said that this was not a criminal proceeding "either in form or substance."

> In form it is an action of debt, and not a criminal prosecution. It is not even required to be instituted or carried on in the name of the people of the State of Illinois, as all criminal prosecutions must be, but simply in the name of the State of Illinois, and the statute might with equal propriety have required the prosecution to have been conducted in the name of the complainant. The violation of the statute, for which the action is given, is not even made a misdemeanor. No

> fine is inflicted, but simply a penalty is imposed. It is true the right of action does not arise out of a contract, and the penalty may be in the nature of a punishment, but that may be the case in many civil actions, as in trespass or slander. Punishments are not alone confined to crimes in the technical sense of the term.

In *Hawlowetz* v. *Kass* (23 Blatch., 395) an action to recover penalties for marking unpatented articles as patented under section 4901, Revised Statutes, Judge Wallace held that the trial court did not err in refusing to instruct the jury that the plaintiff was required to prove his case with the same particularity and exactness as on the trial of an indictment. He said (p. 398):

> In many actions for penalties the issue does not involve an act of any appreciable degree of moral turpitude on the part of the defendant. Many statutes create penalties for acts of mere neglect, in which the knowledge or intention of the offender is not an ingredient. The public welfare may require a rigorous enforcement of some statutes of this kind, but the transgressor is not a criminal, and it seems absurd, when he is charged in a civil suit with their infraction, to regard him as such and try him by the rules of criminal evidence. If one rule of criminal evidence is to apply all should apply. If a jury are only to find a verdict upon a case proved beyond a rational doubt, then the defendant should be permitted to throw his character into the scale of conflict-

ing probabilities, and prove general good character, to rebut circumstantial evidence of guilt.

Judge Wallace analyzed the case of *Chaffee* v. *United States* (18 Wall., 516) and showed that that case did not hold that in a penalty suit the burden rests upon the Government to make out its case beyond a reasonable doubt.

In *Lilienthal's Tobacco Co.* v. *United States* (97 U. S., 237) a forfeiture case in which the defendant was charged with acts in fraud of the revenue, the Supreme Court considered whether the court below erred in not instructing the jury that they could not find that the property was forfeited unless the matters charged were proved beyond a reasonable doubt. Mr. Justice Clifford stated that the question was not properly raised, but intimated quite plainly that there was no merit in the point (p. 271).

There is no question in this case of the quantum of proof necessary in an action to recover a penalty because the Circuit Court of Appeals has certified a question in which it is stated that "it appears by undisputed testimony that a defendant has committed an offense." Therefore, the Government proved the allegations of the complaint beyond a reasonable doubt, and accordingly the question whether or not the case should have gone to the jury if the government's case had been proved by a mere preponderance of the evidence is not involved here.

In regard to new trials, the rule is that the court may grant a new trial in actions to recover a penalty although the first trial may have resulted in a verdict for the defendant.

In 1792, in the Court of King's Bench, in the case of *Wilson* v. *Rastall* (4 Term Rep., 753), it was so held by a unanimous court, Lord Kenyon, Chief Justice, and Buller, J., writing opinions. In that case an action was brought to recover penalties under the bribery act. The jury found a verdict for the defendant, and a rule nisi was granted to show cause why there should not be a new trial for error by the trial judge, which rule was made absolute. Chief Justice Kenyon said (p. 758):

> But wherever a mistake of the judge has crept in, and swayed the opinion of the jury, I do not recollect a single case in which the court has ever refused to grant a new trial. All the cases of indictments I lay out of the case, because they are criminal cases, and are exceptions to the general rule. But I consider this as a civil action.

The same year, in *Calcraft* v. *Gibbs* (5 Term Rep., 19), the Court of King's Bench granted a new trial in an action of debt for a penalty under the game laws, although the jury had found fo. e defendant on the first trial.

Judge Hopkinson said in the case of the *United States* v. *Halberstadt* (Gilpin (U. S.), 268) that in an action to recover a pecuniary penalty the court has full power to grant a new trial, although the verdict

was in favor of the defendant, citing the two English cases above noted.

In the *State* v. *Brown* (16 Conn., 54, 59) Judge Church, in delivering the opinion of the court, said:

> In civil actions for the recovery of penalties, * * * new trials may be granted, even after an acquittal. And in the case of *Wilson* v. *Rastall* (4 Term Rep., 753) the court expressly alludes to the established distinction in this respect, between civil actions for the recovery of penalties, and public prosecutions for public offenses. (*Calcraft* v. *Gibbs*, 5 Term Rep., 19; *The King* v. *Francis*, 2 Term Rep., 484; *Lord Selsea* v. *Powell*, 6 Taun., 297.)

As long ago as 1795 Circuit Justice Iredell held that, in an action to recover a penalty, the defendant could not be held in bail. (*U. S.* v. *Mundell*, 1 Hughes, 415; 6 Call., 245.) The judge said:

> The single question then is, "Whether in an action of debt, at the instance of the United States in this court, for a penalty under an act of Congress, the marshal has a right to require bail of the party." * * * The Congress have made some express provisions in regard to bail in criminal cases. They have made none that I can discover in civil cases.
>
> It is scarcely necessary to stop here to observe that the proceeding in question was not a proceeding in a criminal case. * * * A criminal proceeding, unquestionably, can only be by indictment or information. The proceeding in question was neither. (Citing 3 Blackstone's Commentaries, 159, 160, 161.)

In *United States* v. *Younger* (92 Fed., 672), an information for the collection of a statutory penalty, the district attorney applied for a bench warrant to subject the defendant to imprisonment, or compel him to give bail. The court refused the warrant, holding that the action was civil in character, and saying:

> The statute * * * does not declare the act of the defendant to be a crime, nor authorize procedure of a criminal nature for the purpose of recovering the penalty.

In *United States* v. *Baltimore and Ohio S. W. R. Co.* (159 Fed., 33) an action to recover a penalty imposed by 34 Statutes, 607, for confining live stock on a train more than twenty-eight hours, it was argued that a writ of error did not lie from the Circuit Court of Appeals to the District Court for the reason that the suit was a criminal case. Judge Severens, writing the opinion for the court, held that argument untenable because the suit was a civil action.

United States v. *Jacobs* (Federal Cases, No. 7157) was a suit brought by the United States to recover a penalty of $500 for an alleged violation of a revenue act providing that the person offending the act should "forfeit and pay the sum of $500." Mr. Chief Justice Marshall, then sitting as circuit justice in the Eastern District of Virginia, held that an action for debt for a penalty under the statute was a civil cause, and therefore a writ of error lay from

the District Court to the Circuit Court of the United States under 1 Statutes, 76.

In an old case, *Stearns* v. *United States* (2 Paine, 300, Federal Cases, No. 13341), Circuit Justice Thompson held that a court of the State of Vermont had jurisdiction in an action brought by the United States to recover a penalty incurred under one of the revenue acts. Of course, if the case had been of a criminal nature a State court would have had no jurisdiction. Justice Thompson said:

> This was not a criminal prosecution, but a civil action to recover a penalty for breach of a statute. * * * To sustain this suit, is not administering the criminal law of the United States. Actions for penalties are civil actions, both in form and in substance, according to Blackstone (3 Comm., 158). The action is founded upon that implied contract which every person enters into with the State to observe its laws. (Cowp., 391; 2 Term. R., 154; 4 Term. R., 756.) * * * State courts are left to consult their own duty from their own state authority and organization. Their jurisdiction of federal causes, says Chancellor Kent (1 Comm., 377), is confined to civil actions for civil demands, or to enforce penal statutes; they can not hold criminal jurisdiction over offenses exclusively existing, as offenses against the United States. Every criminal prosecution must charge the offense to have been committed against the sovereign whose courts sit in judgment upon the offender. (See 1 Kent, Comm., 370.)

So on the question of venue, penalty suits are treated as civil suits. In the *Zucker case* (supra, p. 6, and infra, p. 26), Mr. Justice Harlan said:

> An action, in which a judgment for money only is sought, even if, in some aspects, it is one of a penal nature, may be brought wherever the defendant is found and is served with process, unless some statute requires it to be brought in a particular jurisdiction.

These cases fully establish our proposition that this suit is a civil action and that therefore the rules governing civil suits apply. In the cases cited whether the question was one of quantum of proof, of arrest and trial, of appeal, of venue, of a new trial, or of a state court's jurisdiction, the court in every instance decided that the question should be answered as in any civil suit and that the procedure which might have been proper if the action had been a criminal proceeding had no application.

The reports, state and federal, contain a number of penalty actions in which the trial court directed a verdict against the defendant. In all these cases the right to direct a verdict for the plaintiff, in an action to recover penalties for the violation of a statute, was assumed by court and counsel. In some of these cases the propriety of such a direction under the evidence was challenged. In none was the right denied.

In *People* v. *Girard* (73 Hun, 457, affirmed 145 N. Y., 105) the trial court directed a verdict for the

State in an action to recover a penalty of $200 under chapter 515 of the laws of New York of 1889, section 7, a statute designed to prevent deception in sales of vinegar and providing that the defendant should "forfeit and pay a fixed penalty of $200 for each offense."

In neither the Appellate Division nor the Court of Appeals was the question raised of the constitutional power of the court to direct a verdict, the only question considered being whether or not the evidence was conflicting.

So in *Fielding* v. *La Grange* (104 Iowa, 530) the trial court directed a verdict of $700 in an action to recover a statutory penalty for selling intoxicating liquor to a minor. The highest court of Iowa affirmed the judgment of the trial court.

In November, 1889, Judge Lacombe, who wrote the opinion in this case in the court below (infra, p. 24), evidently held a different view of the statute, for in *United States* v. *Thompson* (41 Fed., 28), an action to recover a penalty of $1,000 under the contract labor law (23 Stat., 333), he directed a verdict, saying, page 29:

> There certainly is no question here for the jury, as there is no conflict of testimony * * * I shall therefore direct a verdict for the Government for the full amount, $1,000.

In *Moller* v. *United States* (57 Fed. Rep., 490), a similar action, the defendant waived a jury trial. The Circuit Court of Appeals regarded this procedure

regular, in view of the fact that the case was a civil suit, saying, page 495:

> The suit, while for a penalty, is a civil suit, and it was so treated by the parties, as may be noticed by the waiver of trial by jury.

In *Hines* v. *Darling* (99 Mich., 47), an action to recover a penalty for willfully obstructing a ditch under a statute providing for a penalty "not exceeding $25," the court directed a verdict for the plaintiff for $25. The Appellate Court held that there was no error except in the fact that the court had taken from the jury the consideration of what the amount of the penalty should be, as the statute imposed a penalty "not exceeding $25." The court said:

> The plaintiff, under the proofs, was entitled to a verdict for at least 6 cents, but the court had no power to say how much greater the amount should be. That question was for the jury.

In *Four Packages* v. *United States* (97 U. S., 404), the United States filed an information for the condemnation and forfeiture of four packages seized by the collector of customs, on the ground that they were unladen from the steamer in which they were imported without a permit from the collector. The case went to trial before the district judge and a jury, and, on the evidence, the court directed the jury to return a verdict of condemnation of the goods. The third principal assignment of error was, "that the court erred in directing the jury to find a verdict in favor of the plaintiffs" (p. 411).

Mr. Justice Clifford, unanimously affirming the judgment below, said (p. 412):

> Taken as a whole, the evidence fully proved that the packages were unladen and delivered without the permit required by the act of Congress; and inasmuch as there was no opposing testimony, the direction of the court to the jury to return a verdict for the plaintiffs was entirely correct. (*Improvement Company* v. *Munson*, 14 Wall., 442; *Ryder* v. *Wombwell*, Law Rep., 4 Ex., 39; Law Rep., 2 P. C., 235.)

In all these cases it will be seen that under the provisions of the Federal Constitution, or, under similar provisions in a state constitution, the right of a trial court, either state or federal, to direct a verdict in an action for the recovery of a penalty for the violation of a statute, has not even been questioned. There is not to be found anywhere a case in which this right has been denied. In the case of *Four Packages* v. *United States* (97 U. S., 404), this court effectually disposes of any contention that might be raised to the contrary, by the remark that—

> inasmuch as there was no opposing testimony, the direction of the court to the jury to return a verdict for the plaintiffs was entirely correct.

The argument of the defendant in support of his contention that the case should have gone to the jury is inapplicable, primarily because the statute under

consideration did not create a crime and the proceeding to collect the penalty was not a criminal prosecution.

The term "criminal prosecution" implies a proceeding commenced by indictment or information against a person accused, who in answer to the charge pleads "guilty" or "not guilty." At the trial in a criminal prosecution the jury determine the guilt or innocence of the accused by a general verdict of "guilty" or "not guilty." In this case, on the other hand, all the proceedings were those characteristic of a civil action, namely summons, complaint, and answer. In a criminal prosecution the accused is subject to arrest, while here he could not be deprived of his liberty.

In *Counselman* v. *Hitchcock* (142 U. S., 547, 563) the court said in referring to the sixth amendment:

> This provision distinctly means a criminal prosecution against a person who is accused and who is to be tried by a petit jury.

In *Post* v. *U. S.* (161 U. S., 583, 587) Mr. Justice Gray said:

> Criminal proceedings can not be said to be brought or instituted until a formal charge is openly made against the *accused*, either by indictment presented or information filed in court, or, at the least, by complaint before a magistrate.

The proper meaning of crime is an indictable offense. (Martin B. in Atty. Gen. Radloff, 10 Exch., 96; 26 Eng. L. and Eq., 416.)

II.

The Circuit Court of Appeals certified the question to this court because it seems to have been in doubt as to the effect of the Lees case (150 U. S., 476), and because it overlooked altogether the Zucker case (161 U. S., 475), which is decisive of the case at bar.

The Circuit Court of Appeals for the Second Circuit originally reversed the judgment of the District Court in this case, but, on a petition for a rehearing by the United States, it finally certified the question to this court for decision.

The part of the original opinion reversing the judgment of the trial court which is in point is as follows (New York Law Journal, May 23, 1908):

> It is assigned as error that the trial judge directed a verdict against the defendant. The very statute now under consideration was before the Supreme Court in *Lees* v. *United States* (150 U. S., 480), and it was held that an action, like this, to recover the prescribed penalty, "though an action civil in form, is unquestionably criminal in its nature." Defendant was therefore entitled to have it left to the jury to say whether they were satisfied beyond a reasonable doubt that defendant was guilty of the offense for which the penalty was imposed. Exception was reserved to the direction of a verdict and the judgment must be reversed.

It will be seen that the Circuit Court of Appeals, in originally deciding this case against the Government and in finally, upon a petition for a rehearing, certify-

ing the question involved to this court, misunderstood the meaning or effect of the decision in the *Lees case* (*supra*). Judge Lacombe, who wrote the opinion below from which we have quoted, had himself, in a similar penalty case (*United States* v. *Thompson*, 41 Fed., 28), directed a verdict for the plaintiff. But he seems to have construed the decision by this court in the *Lees case* to mean that, because, under the *fifth* amendment, a defendant in a penalty case for the violation of the very statute here involved could not be compelled to be a witness against himself, therefore such an action becomes a criminal prosecution under the *sixth* amendment, and the court is without power to direct a verdict. We submit that this is a *non sequitur*. It is true, as this court has frequently held, that certain rights guaranteed by the *fifth* amendment apply to all cases criminal in their nature, whether criminal in form or not. Among these rights is that of immunity from testifying against oneself. But it does not follow that the provisions of the *sixth* amendment apply with equal force to all such actions. Doubtless, the Circuit Court of Appeals, in originally rendering judgment against the Government in this case, and in ultimately certifying the question here for decision, was influenced by the *Boyd case* (116 U. S.). In that case also this court held that suits for forfeitures are quasi-criminal in nature, and defendants in such actions are entitled to the protection of that portion of the *fifth* amendment which declares that no person shall be compelled in any criminal case to be a witness against himself.

It is apparent that neither of these cases would have affected the judgment of the court below, if it had examined the *Zucker case* (161 U. S., 475). This last-named case is, we believe, decisive of the question presented to the court. It points out clearly the difference between the words "criminal case" as used in the *fifth* amendment and "criminal prosecution" as used in the *sixth* amendment. A criminal case is a much broader term, as this court has held, than a criminal prosecution. Any action, even though civil in form, which partakes of the nature of a criminal proceeding is a criminal case; whereas a criminal prosecution is that which follows an indictment or information. In other words, a criminal case may be civil in form, but a criminal prosecution must be criminal in form. To put it otherwise, the fifth amendment, after declaring the necessity of grand jury indictments in all cases of capital or otherwise infamous crimes, and protecting the accused against being put twice in jeopardy for the same offense, ordains that he shall not be compelled, "*in any criminal case*," to be a witness against himself. In construing these words, this court in effect has said that the framers of the Constitution meant that, in any case, criminal or quasi-criminal in character, whatever its form, the defendant should not be compelled to produce evidence to his own disadvantage.

But the sixth amendment concerns entirely different matters. It deals with "*criminal prosecutions;*" that is to say, with proceedings upon the trial of a

criminal charge. It presupposes the existence of an information or an indictment, and declares what the rights of the accused shall be upon the trial of the accusation brought against him. It presupposes the commission of a crime, because it says that, in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district "wherein the *crime* shall have been committed." Applying that test to the case at bar we submit that there is no basis for a contention that this suit by the United States to recover a money judgment is a criminal prosecution. It proceeds by summons and complaint in the District Court of the United States for the Southern District of New York. The defendant has not plead "guilty" or "not guilty." He has answered, and the case has gone to trial upon these pleadings. Under no conceivable circumstances in the case at bar is the liberty of the defendant at stake. Now, the *Zucker case* (*supra*), to which we have already referred, is conclusive against the claim of our adversaries here. In that case this court directly held that the Lees and Boyd cases were inapplicable in construing the term "criminal prosecution," and it admitted in evidence a foreign deposition in an action to recover the value of merchandise forfeited to the United States, although the sixth amendment requires that, in a criminal prosecution, the accused shall be confronted with the witnesses against him. Mr. Justice Harlan said (p. 480):

> The principles announced in the *Boyd case* have no application whatever to the present

case. Neither the constitutional provision which protects the people in their persons, houses, papers, and effects against unreasonable searches and seizures, nor the provision that a person shall not be compelled in any criminal case to be a witness against himself, has any bearing whatever upon the inquiry whether the right of an accused, in *a criminal prosecution*, "to be confronted with the witnesses against him," is infringed by permitting a deposition of a living witness to be read against him in an action brought to recover the value of merchandise forfeited to the United States by reason of his acts in violation of law. This is so manifest that it is impossible, by any argument, to make it clearer.

Further proceeding, Mr. Justice Harlan said:

Equally inapplicable to the present inquiry is the case of *Lees* v. *United States* (150 U. S., 476). *That was a civil action to recover a penalty* * * * for importing an alien under a contract to perform labor. Our attention has been called to that part of the opinion in that case, in which it was declared, upon the authority of *Boyd* v. *United States*, above cited, that although the proceeding against Lees was civil in form, it was "unquestionably criminal in its nature, and in such a case a defendant can not be compelled to be a witness against himself." But that principle is not involved in the present case.

Mr. Justice Harlan also said:

The sixth amendment relates to a prosecution of an accused person which is technically

criminal in its nature. In such a proceeding, the person accused is entitled to a speedy and public trial by an impartial jury of the State, as well as of a district previously ascertained by law in which the crime charged against him shall have been committed; whereas an action, in which a judgment for money only is sought, even if, in some aspects, it is one of a penal nature, may be brought wherever the defendant is found and is served with process, unless some statute requires it to be brought in a particular jurisdiction. The words, in the sixth amendment, "to be informed of the nature and cause of the accusation," obviously refer to a person accused of crime, whether a felony or misdemeanor, for which he is prosecuted by indictment or presentment, or in some other authorized mode which may involve his personal security. * * *

A witness who proves facts entitling the plaintiff in a proceeding in a court of the United States, even if the plaintiff be the Government, to a judgment for money only, and not to a judgment which directly involves the personal safety of the defendant, is not, within the meaning of the sixth amendment, a witness against an "accused" in a criminal prosecution. * * * The defendant, in such a case, is no more entitled to be confronted at the trial with the witnesses of the plaintiff than he would be in a case where the evidence related to a claim for money that could be established without disclosing any facts tending to show the commission of crime.

Finally, concluding, the court announced this principle in the Zucker case:

> But it does not follow that the defendants can demand of right, in this civil action, *not directly involving their personal security*, that they shall be confronted, at the trial, with the witnesses who testify in behalf of the Government.

So in the case of *Counselman* v. *Hitchcock* (142 U. S., 547) this court says (p. 563):

> A criminal prosecution, under article 6 of the amendments, is much narrower than a "criminal case," under article 5 of the amendments.

That there is nothing in either the Lees or Boyd cases to justify the contention that a suit for a penalty is a criminal prosecution under the sixth amendment is readily revealed by any critical inspection of these cases. In the *Lees case*, the United States brought an action, civil in form, to recover a penalty for importing an alien laborer (23 Stats., 333, c. 164), and the only question involved was whether or not the defendant could be compelled to be a witness against himself. On this point, Mr. Justice Brewer said (p. 480):

> This, though an action civil in form, is unquestionably criminal in its nature, and in such a case a defendant can not be compelled to be a witness against himself. It is unnecessary to do more than to refer to the case of *Boyd* v. *United States* (116 U. S., 616). The question was fully and elaborately considered by Mr. Justice Bradley in the opinion de-

> livered in that case. And within the rule there laid down it was error to compel this defendant to give testimony in behalf of the Government.

In the *Boyd case* an action was brought to forfeit certain property fraudulently imported, and the United States attorney attempted, by order of the court, to compel the claimant of the property to produce certain invoices which would have tended to incriminate him, in the sense that it would have established the fraud and resulted in the loss of the property by way of penalty. Mr. Justice Bradley said (p. 634):

> The information, though technically a civil proceeding, is in substance and effect a criminal one. * * * As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law, are of this quasi criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the fourth amendment of the Constitution, and of that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself.

Nor is there any contrary view to be found in the case of *Chaffee & Company* v. *The United States* (18 Wall., 516, 544), which was like the Boyd case in that an effort was made to compel the defendant to incriminate himself in violation of the fifth amendment. It was an action to recover a penalty of $800,000, double the amount of taxes which should

have been paid on distilled spirits. The trial court charged the jury in substance that if the Government had made out a prima facie case against the defendant, not one free from all doubt, but one which disclosed circumstances requiring explanation, then if the defendant did not explain, although having proof of certain material facts in his power, the law presumed against the defendant and authorized the jury to resolve all doubts adversely to the defense. Mr. Justice Field said (p. 545):

> We do not think it at all necessary to go into any argument to show the error of this instruction. The error is palpable on its statement. All the authorities condemn it (citing the case of *Clifton* v. *United States*, 4 Howard). * * * The instruction sets at naught established principles, and justifies the criticism of counsel that it substantially withdrew from the defendants their constitutional right of trial by jury, and converted what at law was intended for their protection—*the right to refuse to testify*—into the machinery for their sure destruction.

It is evident that, in the Chaffee case, the thought which Mr. Justice Field had in mind was that the charge to the jury in effect compelled the witness to give evidence against himself, thus violating the fifth amendment.

We submit, therefore, upon the second point in this brief, that the Circuit Court of Appeals would have rendered a judgment for the Government in this case if it had not been for its misconstruction of the mean-

ing of the Lees and Boyd cases, and the failure to observe the plain distinction between the fifth and sixth amendments, as pointed out in the Zucker and Counselman cases.

III.

The defendant had a jury trial; neither the statute nor the trial court deprived him of that right.

We have heretofore shown, first, that this is a civil action, and secondly, that it is not a criminal prosecution under the sixth amendment. It follows that the defendant was not entitled to have the case submitted to a jury for decision if the evidence in favor of the Government was undisputed.

We next come to consider what the defendant was entitled to and the privilege he actually enjoyed at the trial. Under the seventh amendment he was entitled to a trial by jury, if this is to be considered a "suit at common law where the value in controversy shall exceed $20." In such actions, however, the courts have uniformly held that the trial judge may direct a verdict for either plaintiff or defendant.

Treat Manufacturing Co. v. *Standard Steel and Iron Co.*, 157 U. S., 674.

Capital Traction Company v. *Hof*, 174 U. S., 1, 16.

Sparf and Hansen v. *United States*, 156 U. S., 51, 100.

The defendant had this jury trial; the evidence was undisputed; there was no issue of fact to be determined by the jury, and the court very properly directed a verdict for the United States.

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The contention of the defendant seems to be, that because Article III declares that the trial of all crimes shall be by jury, and because the sixth amendment declares that in all criminal prosecutions the accused shall enjoy the right to a trial by an impartial jury, it follows that in all cases in which a jury trial is necessary, even including civil cases like the present one, the defendant is entitled to the judgment of the jury, although there be no evidence whatever upon which a verdict in his favor could be based.

In asserting a right to go to the jury, although the case is proved beyond dispute against him so that there is no issue of fact for the jury to decide, the defendant manifestly is relying on the hope that the jury, violating their oath to decide the case according to the evidence, will bring in a verdict for him. In other words, he is asserting that in this civil case, disregarding the undisputed testimony, the jury have the power to find a verdict contrary to the evidence and which he maintains can not be set aside by the court; that the jury have the privilege of deciding whether or not they shall apply the law to the case, irrespective of the declaration of Congress that it shall apply under the circumstances proven.

If this court accepts this view, it will extend the power of the jury far beyond its present boundaries; it will give the jury an authority which it has never possessed at common law, and which is contrary to the principles underlying the development of the jury system. Such a holding will confer upon the jury in this suit, brought to recover money damages

for a pecuniary liability imposed by statute for a violation of law—a power which has existed only in criminal prosecutions involving imprisonment of the accused, and the existence of which even there has been severely criticised.

It is well known that the right of trial by jury in the case of crimes developed from the struggles in England against the power of the Crown, which had been arbitrarily exercised, to seize or imprison the subjects of the King. The clause in Magna Charta on this subject provides that "no freeman shall be seized or imprisoned or dispossessed or outlawed or in any way destroyed; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land" (Magna Charta, edited by Boyd C. Barrington, Philadelphia, 1900, p. 239). The things for which the barons were fighting King John were safety of the person and the maintenance of the possession of their lands against the arbitrary power of the sovereign to imprison, exile, or dispossess his subjects.

Bracton said (quoted by Erskine in his speech in support of the Rights of Juries (Erskine's Speeches, vol. 1, p. 233) in the case of the Dean of St. Asaph (Howell's State Trials, vol. 21, p. 847):

> The *curia* and the *pares* were necessarily the judges in all cases of *life, limb*, crime, and disherison of the heir in capite. The King could not decide, for then he would have been both prosecutor and judge; neither could his justices, for they represent him.

See also Reeves' History of English Law, vol. 1, p. 463.

And Blackstone said (Book 4, ¶ 349) on the subject of jury trial in criminal cases:

> Our law has therefore wisely placed this strong and twofold barrier of a presentment and trial by jury between the liberties of the people and the prerogative of the Crown. Without this barrier, justices of oyer and terminer named by the Crown might, as in France or in Turkey, *imprison, dispatch, or exile* any man that was obnoxious to the Government by an instant declaration that such is their will and pleasure.

These quotations support our contention that the jury system in criminal cases is designed to safeguard the personal liberty of the citizen.

From the outset, in all cases, criminal and civil, the trial court has exercised a large influence in determining the result of the trial. In the early days, a jury which brought in a verdict contrary to the evidence was subject to a severe punishment, upon a writ of attaint, if the grand inquest convicted them of finding a false verdict.

Coke says (Co. Litt., vol. 2, sec. 368, 228a):

> Although the jury, if they will take upon them the knowledge of the law, may give a general verdict, yet it is dangerous for them so to do, for, if they do mistake the law, they run into the danger of an attaint.

To avoid this risk, it became the custom for the jurors to render special verdicts, stating all the facts in the case and referring the question of law to the

court. Later on in civil actions, by demurrers to the evidence, the same result was reached of submitting for the decision of the court all the questions of law. Finally, the practice of directing verdicts or setting them aside upon motion and granting new trials so superseded the use of attaints that there are few instances of an attaint in the books later than the sixteenth century. (Forsyth on Trial by Jury, 154.)

For centuries the trial court exercised the power of fining and imprisoning jurors in criminal cases for bringing in verdicts of acquittal contrary to the evidence and the instructions of the court. It was not until 1670, in Bushell's case, that the Court of King's Bench decided that the practice of fining or imprisoning jurors for verdicts was contrary to law. (Vaughan, 135.)

The power of attaint and the authority to fine and imprison jurors, thus continued through centuries, indicate the extent of the power of the court over the jury. As attaint passed away, the influence of the court on the verdict was still maintained under its authority to set aside verdicts and grant new trials, under the maxim "*ad questionem facti, non respondent judices, ad questionem juris, non respondent juratores.*"

The power of the jury which developed during these years in criminal cases, to find a verdict for the accused contrary to the evidence, is to be considered in the light of the rules which prevailed in the conduct of criminal trials in those days. Throckmorton's case (1 Howell's State Trials, 870) is illus-

trative. In that case, a trial for high treason in 1554, the jury were fined and imprisoned by the court for bringing in a verdict of not guilty contrary to the evidence. During the trial Throckmorton had no counsel and was denied the right to summon a witness who, he stated, could testify in contradiction of a witness called by the prosecution. He conducted his own case, was compelled to be a witness against himself, and was repeatedly intimidated by both the attorney-general and the court, although his life was at stake.

So in *Penn* v. *Mead* (6 Howell's State Trials, 951, 967) a trial in 1670 on an indictment for an unlawful assemblage, the court abused the jury for being unable to reach a verdict, and finally, when they brought in a verdict of not guilty, it fined them 40 marks apiece, saying:

> I am sorry, gentlemen, you have followed your own judgments and opinions rather than the good and wholesome advice which was given you.

And in the reign of James I it was held by the Lord Chancellor, the two Chief Justices, and the Chief Baron that, when a jury has acquitted a felon or traitor against manifest proof, they may be judged in the Star Chamber for their partiality in finding a manifest offender not guilty. (12 Coke Reports, 23; Forsyth's Trial by Jury, p. 344.)

In 1685, in the trial of Mrs. Alice Lisle, the jury twice brought in a verdict of not guilty, but each time were sent back by the court until finally, upon

their third appearance, they brought in a verdict of not guilty. (11 Howell's State Trials, 208–382.)

In *Sparf and Hansen* v. *United States* (156 U. S., 51, 143) Mr. Justice Gray, in his dissenting opinion, said:

> It is to be remembered, that by the law of England, a person convicted of treason or felony could not appeal, or move for a new trial, or file a bill of exceptions, or in any other manner obtain a judicial review of rulings or instructions not appearing upon the record, unless the judge himself saw fit to reserve the question for the opinion of all the judges. * * * * *The Queen* v. *Eduljee Byramjee*, 5 Moore P. C., 276, 287; *The Queen* v. *Bertrand*, L. R. 1 P. C., 520; 1 Chit. Crim. Law, 622, 654; 3 Russell on Crimes (9th ed.), 212. Consequently, a prisoner tried before an arbitrary, corrupt or ignorant judge had no protection but in the conscience and the firmness of the jury.

In criminal prosecutions conducted under these circumstances, the right to a trial by jury was of little real value unless the jury had the power to determine the question of law as well as of fact by a general verdict, and to decide whether or not to apply the law to the case. And yet this authority of the jury was never extended to any case other than one involving the personal liberty of the accused, where the charge was by indictment or information and the accused pleaded "not guilty." No case can be found in the books, so far as we

can discover, in which the doctrine was applied to actions brought by the Government or by private parties to recover a pecuniary penalty for violation of a statute.

To-day the reasons on account of which this power of the jury developed have passed away. There is no longer an occasion for the exercise of the power, even in criminal prosecutions. Will this court, then, extend a doctrine which is no longer necessary to cases to which it has never applied in the past?

In the *Dean of St. Asaph's case*, a libel suit, Lord Mansfield expressed this idea as follows:

> Jealousy of leaving the law to the court, as in other cases, is now, in the present state of things, puerile rant and declamation. The judges are totally independent of the ministers that may happen to be, and of the king; their temptation is rather to the popularity of the day.
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> Upon the reason of the thing, and the eternal principles of justice, the jury ought not to assume the jurisdiction of law; they do not know, and are not presumed to know, anything of the matter; they do not understand the language in which it is conceived, or the meaning of the terms; they have no rule to go by but their passions and wishes. (See *Rex* v. *Dean of St. Asaph*, 3 Term, R. 428, and note, 431.)

In *Sparf and Hansen* v. *United States* (156 U. S., 51, 106) Mr. Justice Harlan, writing the opinion, said:

> The main reason ordinarily assigned for a recognition of the right of the jury, in a criminal case, to take the law into their own hands, and to disregard the directions of the court in matters of law, is that the safety and liberty of the citizen will be thereby more certainly secured. That view was urged upon Mr. Justice Curtis. After stating that if he conceived the reason assigned to be well founded, he would pause long before denying the existence of the power claimed, he said that a good deal of reflection had convinced him that the argument was the other way. He wisely observed, that "as long as the judges of the United States are obliged to express their opinions publicly, to give their reasons for them when called upon in the usual mode, and to stand responsible for them, not only to public opinion, but to a court of impeachment, I can apprehend very little danger of the laws being wrested to purposes of injustice. But, on the other hand, I do consider that this power and corresponding duty of the court, authoritatively to declare the law, is one of the highest safeguards of the citizen. The sole end of courts of justice is to enforce the laws uniformly and impartially, without respect to persons or times or the opinions of men.' To enforce popular laws is easy. But when an unpopular cause is a just cause; when a law, unpopular in some locality, is to

> be enforced, there then comes the strain upon the administration of justice; and few unprejudiced men would hesitate as to where that strain would be most firmly borne." (*United States* v. *Morris*, 1 Curtis, 23, 62, 63.)

In the *Sparf case* this court held that in a trial in a United States court for murder it is not error to instruct the jury that they can not return a verdict of guilty of any offense less than the one charged, there being no evidence whatever to support a verdict of guilty of an offense less than the one charged. This court in an exhaustive opinion laid down the rule that it is the duty of the jury in criminal cases to receive the law from the court and apply it as given.

To repeat, we contend that the authority of the jury at common law to decide the law as well as the facts by a general verdict never existed in cases involving the recovery of penalties or money damages, and that it was restricted to actions in which the liberty of the accused was at stake and where the charge was by indictment or information and the plea "not guilty." At common law it was limited to cases of "infamous crime" as the term is used in the fifth amendment, and to cases of "crime" as that term is defined by Mr. Justice Harlan in *Callan* v. *Wilson* (127 U. S., 540, 549). An "infamous crime," this court has held, is a crime punishable by imprisonment in the state prison or penitentiary. (*Bannon* v. *U. S.*, 156 U. S., 464; *In re Claasen*, 140 U. S., 200; *Mackin* v. *U. S.*, 117 U. S., 348; *Ex Parte*

Wilson, 114 U. S., 417.) In *Callan* v. *Wilson* (127 U. S., 540, 549) Mr. Justice Harlan was discussing the meaning of the word "crime" in the third article of the Constitution, which provides for a jury in the trial of all crimes. It was there argued that the term related only to felonies punishable by confinement in the penitentiary—that is, to infamous crimes. The court decided against this contention and held that the term "crime" was broader. But Mr. Justice Harlan clearly indicates that the word "crime" as used in Article III does not extend to cases in which imprisonment is not involved, for he says:

> It is not to be construed as relating only to felonies, or offenses punishable by confinement in a penitentiary. It embraces as well some classes of misdemeanors, *the punishment of which involves or may involve the deprivation of the liberty of the citizen.*

Mr. Justice Harlan evidently had in mind the same idea when he said in *Thompson* v. *Utah* (170 U. S., 343, 353):

> The wise men who framed the Constitution of the United States and the people who approved it were of opinion that *life and liberty*, when involved in criminal prosecutions, would not be adequately secured except through the unanimous verdict of twelve jurors.

No action which does not involve the deprivation of the life or liberty of the defendant can be termed a criminal prosecution of the kind that entitles the

defendant to a constitutional right to have the case go to the jury where the testimony against him is undisputed.

For these reasons it is respectfully submitted that the question herein certified by the Circuit Court of Appeals for the Second Circuit should be answered in the affirmative.

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